Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–6 OF 2005
JAMES FOONG, SURIYADI AND AHMAD MAAROP JJCA
4 AUGUST 2008

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Administrative Law — Exercise of administrative powers — Domestic discipline — Application by engineer to restrain Engineers' Board from proceeding with complaint — No decision made by Board to revoke engineer's registration — Whether engineer's application premature — Whether engineer's application attempt to hinder Board's right to exercise its statutory duties — Whether such application abuse of court's process

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Civil Procedure — Mode of commencement — Originating summons — Application to impugn decision of public authority — Application involving primarily public law rights — Whether originating summons appropriate mode of commencement — Whether application ought to be pursued as judicial review under O 53 of the Rules of the High Court 1980

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Professions — Engineers — Disciplinary proceedings — Originating summons brought by engineer to restrain Engineers' Board from proceeding with disciplinary proceedings against engineer — Application involving primarily public rights — Whether originating summons appropriate mode of commencement — Whether application ought to be pursued as judicial review under O 53 of the Rules of the High Court 1980 — Whether application premature

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Acting on a complaint, the respondent commenced disciplinary proceedings against the appellant. Before the respondent could proceed on a revised charge against the appellant, the appellant applied by way of originating summons for various declarations and orders. He also sought an injunction against the respondent to restrain it from proceeding with the revised charge against him. The respondent's application to strike out the appellant's originating summons was granted by the High Court. The appellant appealed to the Court of Appeal.

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Held, dismissing the appeal with costs:

(1) The High Court had applied the correct principle of law in determining

the respondent's application, viz, it would be contrary to public policy and an abuse of process to allow an individual to impugn the decision of a public authority through an ordinary action rather than under O 53 of the Rules of the High Court 1980 ('RHC') — which provision exists for the protection of public authorities (see para 14); *O'Reilly v Mackman* [1983] 2 AC 237 and *Dato' Seri Anwar Ibrahim v Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422 referred.

(2) The prayers sought by the appellant in his originating summons involved primarily public law rights. The correct approach in such a case would be to proceed by way of judicial review under O 53 of the RHC, rather than by way of originating summons (see para 16).

(3) The appellant's application was premature as it would restrain the respondent from exercising its statutory duties. The appellant was abusing the process of the court in attempting to delay the start of the disciplinary hearing against him. Such abuse should cease (see para 17).

[Bahasa Malaysia summary

Bertindak atas aduan, responden telah memulakan prosiding tatatertib terhadap perayu. Sebelum responden dapat memulakan atas pertuduhan yang disemak terhadap perayu, perayu telah memohon melalui saman pemula untuk pelbagai deklarasi dan perintah. Dia juga memohon injunksi terhadap responden untuk menyekatnya daripada meneruskan dengan pertuduhan yang disemak terhadapnya. Permohonan responden untuk membatalkan saman pemula pemohon telah dibenarkan oleh Mahkamah Tinggi. Perayu telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Mahkamah Tinggi telah memohon prinsip undang-undang yang betul bagi menentukan permohonan responden, iaitu, ia adalah bertentangan dengan polisi awam dan satu penyalahgunaan proses untuk membenarkan seorang individu mempersoalkan keputusan pihak berkuasa awam melalui tindakan biasa dan bukan melalui A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') — peruntukan yang wujud bagi melindungi pihak berkuasa awam (lihat perenggan 14); *O'Reilly v Mackman* [1983] 2 AC 237 dan *Dato' Seri Anwar Ibrahim v Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422 dirujuk.

(2) Permohonan yang dipohon oleh perayu dalam saman pemulanya terutamanya melibatkan hak-hak undang-undang awam. Pendekatan

yang betul dalam kes sedemikian adalah untuk meneruskan melalui semakan kehakiman di bawah A 53 KMT, dan bukan melalui saman pemula (lihat perenggan 16).

(3) Permohonan perayu adalah pramatang kerana ia menyekat responden daripada melaksanakan kewajipan statutorinya. Perayu menyalahgunakan proses mahkamah dalam mencuba untuk melengahkan permulaan pendengaran tatatertib terhadapnya. Penyalahgunaan sedemikian patut dihentikan (lihat perenggan 17).]

Notes

For a case on domestic discipline, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 43.

For cases disciplinary proceedings against engineers generally, 10 Mallal's Digest (4th Ed, 2005 Reissue) paras 1612–1618.

For cases originating summons, 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4810–4817.

Cases referred to

Dato' Seri Anwar Ibrahim v Perdana Menteri Malaysia & Anor [2007] 4 MLJ 422; [2007] 3 CLJ 377, CA (refd)

O'Reilly v Mackman [1983] 2 AC 237, HL (refd)

Roy v Kensington & Chelsea & Westminster Family Practitioner Committee [1992] 2 WLR 239, HL (refd)

Wandsworth London Borough Council v Winder [1985] 1 AC 461, HL (refd)

Legislation referred to

Federal Constitution arts 5, 8

Registration of Engineers Act 1967 ss 7(1)(a), 15, 15(1), 15(1)(g), 15(2), 26

Registration of Engineers Rules 1972 s 25 of Part IV, r 25

Rules of the High Court 1980 O 18 r 19(1)(b), O 18 r 19(1)(c), O 18 r 19(1)(d), O 53

Appeal from: Originating Summons No R1–24–20 of 2004 (High Court, Kuala Lumpur)

Dominic Puthucheary (Firoz Hussein and Cheng Mai with him) (Puthucheary Firoz & Mai) for the appellant.

Chu Ai Li (Leong Yin Wei with her) (Azman Davidson & Co) for the respondent.

James Foong JCA (delivering judgment of the court):

BACKGROUND

[1] We shall begin by disclosing the background leading to this appeal. The

A appellant is a professional engineer registered under the provisions of the Registration of Engineers Act 1967 ('the Act'). He practiced as an engineer in a company known as Sigoh Din Sdn Bhd. This company is or was a body corporate of consulting engineers approved to practice as such by the Act.

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[2] Sigoh Din Sdn Bhd was awarded a contract by the Ministry of Defence of Malaysia ('Mindef') to construct and complete an ammunition depot in Malacca. Aside from being a director of this company, the appellant was also the consultant engineer in charge of this project. Due to some complaints by C Mindef, the Lembaga Jurutera Malaysia (the respondent) commenced disciplinary proceedings against the appellant. The appellant was charged for contravening s 25 of Part IV (Code of Professional Conduct) of the Registration of Engineers Rules 1972 ('the Rules') which was made under s 26 of the Act.

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[3] Before the disciplinary proceedings could commence, the appellant applied to the High Court for a declaration that since the alleged contravention took place before January 1987, no disciplinary action can be E taken against him by virtue of s 15 of the Act. Aside from this, he also requested for a prohibitive injunction to restrain the respondent from investigating him on the complaints filed by Mindef.

[4] On 18 July 1996, the High Court dismissed his application. He F appealed to the Court of Appeal but the Court of Appeal affirmed the decision of the High Court. Dissatisfied, he sought leave from the Federal Court to appeal. The Federal Court granted him leave but before the appeal could be heard, the appellant withdrew his appeal. According to the G appellant, the appeal was withdrawn on the understanding that the respondent would withdraw the charge against him.

[5] The respondent did not withdraw the charge against him but instead revised the original charge to the following:

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> That you, Cheah Foong Chiew, while a director of Sigoh Din Sdn Bhd ('the company') which undertook to supervise the construction of an ammunition depot project at Masjid Tanah, Malacca ('the project') for the Government of Malaysia did between 1981 and 1983 fail to uphold the dignity, standing and I reputation of the engineering profession by your failure as the director of the company in charge of the project to exercise control in a professional manner over the company's resident staff engaged in supervising the project and you have thereby contravened Rule 25 of the Registration of Engineers Rules 1972 punishable under section 15(1)(g) of the Registration of Engineers Act 1967.

[6] When the appellant became aware of this, he raised a preliminary objection with the respondent. This involved the following issues:

(1) whether the respondent has the jurisdiction to maintain the revised charge in view that between 1981 to 1983, s 15(1)(g) of the Act did not include r 25 of the Rules and that this rule was only included as part of s 15(1)(g) of the Act in 1987; and

(2) whether the respondent has the right to charge the appellant under s 15(1)(g) of the Act as a director of Sigoh Sdn Bhd in view of s 7(1)(a) of the Act.

[7] The hearing of these preliminary issues was fixed for hearing on 7 July 2001. However, at the request of the appellant, who cited that he was not medically fit to attend the hearing, it was postponed. The appellant then suggested that instead of an oral hearing to determine these preliminary issues, written submissions be permitted. This was acceded to, and on 25 July 2001 the appellant duly handed in his written submission to the respondent.

[8] On 28 January 2002, the respondent dismissed the appellant's preliminary objection.

[9] Before the respondent could proceed further with the disciplinary hearing, the appellant on 23 April 2004 applied to the High Court by way of originating summons for the following:

(1) A declaration that the revised charge against him is ultra vires of the Act.

(2) Alternatively, a declaration that the revised charge is ambiguous and bad in law.

(3) A declaration that the respondent's letter of 28 January 2002 (mistakenly dated 28 January 2001) is contrary to natural justice and/or infringes the appellant's rights under the Federal Constitution to procedural fairness including but not limited to arts 5 and 8.

(4) A declaration that the disciplinary procedures adopted by the respondent against him are contrary to natural justice and/or infringes the appellant's rights under the Federal Constitution to procedural fairness including but not limited to arts 5 and 8.

(5) A declaration that the said disciplinary procedures are biased and constitute an infringement of the appellant's rights under arts 5 and 8 of the Federal Constitution.

(6) A declaration that the respondent had acted contrary to the rules of natural justice in determining that it has established a prima facie case against the appellant without giving him an opportunity to be heard.

(7) A declaration that the respondent had acted ultra vires of the Act and exceeded its jurisdiction conferred under the Act in purporting to revise the original charge vide its letter of 28 February 2001.

(8) A declaration that the revised charge is bad on grounds of mala fides and/or stale in law.

(9) An order that the revised charge be set aside.

(10) An injunction to prohibit the respondent and/or its servants and/or its agents from commencing or conducting hearing against the respondent on the revised charge.

APPLICATION TO STRIKE OUT

[10] In response to this, the respondent filed an application (encl 12) to strike out this originating summons of the appellant on the ground that it is an abuse of the court's process.

DECISION OF THE HIGH COURT

[11] The High Court allowed this application and struck out the appellant's originating summons under O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ('the RHC').

[12] The reasons proffered by the High Court are these:

(i) What the appellant is seeking in the originating summons is to judicially review the acts and decisions of the respondent in exercise of its statutory powers. This is a public law remedy. As such, the appellant should proceed by way of judicial review rather than by an originating summons for a declaration and injunction.

(ii) That this approach may have been adopted by the appellant to evade the necessity to obtain leave from court to file such application; a requirement for judicial review under O 53 of the RHC. Leave would most likely to be refused because: (a) the appellant is out of time in filing such application and; (b) the appellant is not the person adversely affected by the decision of the respondent since: (i) no decision was considered made under s 15(1) of the Act and; (ii) the interlocutory decision of the respondent has not adversely affected the appellant.

(iii) The appellant's originating summons is premature since the respondent has not made any order to cancel the appellant's registration as an engineer under s 15 (1) of the Act. In fact, this application of the appellant for an injunction 'would in effect pre-empt or hinder the

respondent's right to exercise its statutory duties and powers under s 15(1) and s 15(2) of the Act. A

THE COURT OF APPEAL'S DECISION AND REASONS

[13] After hearing arguments, we upheld the decision of the High Court and dismissed the appellant's appeal with costs. Our reasons are these. B

[14] First, we are of the view that the High Court in deliberating the application has applied the correct principle of law as set out in *O'Reilly v Mackman* [1983] 2 AC 237 (and adopted by our courts in *Dato' Seri Anwar Ibrahim v Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422 at p 437; [2007] 3 CLJ 377 at p 397) which is: C

> ... it would as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities. D

[15] Secondly, we find that in substance and in fact what the appellant is requesting in his originating summons involves principally and primary public law rights rather than private law rights. E

[16] Thirdly, though we are conscious of the English House of Lords decisions in *Wandsworth London Borough Council v Winder* [1985] 1 AC 461 and *Roy v Kensington And Chelsea And Westminster Family Practitioner Committee* [1992] 2 WLR 239 which says: F

> ... where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him. G

We are of the view that the prayers sought by the appellant involve principally and primarily public law rights rather than private law rights. When they overwhelmingly concern public law rights, then the correct approach should be by way of judicial review under O 53 of the RHC rather than by way of originating summons. H I

[17] Finally, we are of the opinion that the High Court is right in holding that the appellant's application is premature as it would restrain the respondent from exercising its statutory duties.

[18] In conclusion, it is our opinion that from the facts of this case the appellant is abusing the process of the court in attempting to delay the start of the disciplinary hearing against him. Such abuse should cease. It has certainly gone on for far too long.

Appeal dismissed with costs. High Court decision upheld.

Reported by Andrew Christopher Simon